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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951
No. 514

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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TABLE OF AUTHORITIES CITED

CASES

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84, 62 S. Ct. 37 3

Dow Chemical Co. v. Halliburton Oil Well Cementing Co., 324 U. S. 320, 65 S. Ct. 647 3

General Motors Corporation v. Leishman, 85 Fed. Supp. 187 1

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275, 64 S. Ct. 593 5

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, 69 S. Ct. 535 5

Haggerty v. Rawlings Mfg. Co., 14 F. 2d 928 4

Johnson v. Lambert, 234 Fed. 886 4

Keller v. Adams-Campbell Co., 264 U. S. 314, 44 S. Ct. 356 2

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 S. Ct. 422 2

Leishman v. Associated Wholesale Electric Co., 137 F. 2d 722; cert. den., 320 U. S. 794, 64 S. Ct. 262 ..... 2, 3

Leishman v. General Motors Corp., 191 F. 2d 522 1

Leishman v. Radio Condenser Co., et al., 167 F. 2d 890; cert. den., 335 U. S. 891, 69 S. Ct. 246; pet. for rehear. den., 336 U. S. 921, 69 S. Ct. 639 ..... 2, 3

Leishman v. The Richards and Conover Company, 336 U. S. 952, 69 S. Ct. 882; pet. for rehear. den., 337 U. S. 927, 69 S. Ct. 1167 ..... 4, 5

Richards and Conover Co. v. Leishman, 172 F. 2d 365 ..... 2, 3, 4

Schreyer v. Chicago Motocoil Corp., 118 F. 2d 852 4

Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364, 62 S. Ct. 1179 5

STATUTES

Supreme Court Rule 38(5b) 1, 2

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Rule 38(5b) of the Rules of this Court is relied upon to support the petition in the instant case, but it is submitted that no reason or ground for the grant of certiorari such as is required by the rule is presented. There is no conflict of decision between Courts of Appeals, and the case merely involves a factual determination by both courts below that invention is not present in United States Letters Patent No. Re. 20,827.

The decision which petitioner desires reviewed is reported as *Leishman v. General Motors Corp.* (1951, 9 Cir.), 191 F. 2d 522, which in holding petitioner's patent invalid for want of invention affirms *General Motors Corporation v. Leishman* (1949, D. C. S. D. Cal.), 85 Fed. Supp. 187. These concurrent decisions

are in square accord with *Richards and Conover Co. v. Leishman* (1949, 10 Cir.), 172 F. 2d 365, which likewise held petitioner's patent lacking in invention. In urging that the decision of the Court of Appeals for the Ninth Circuit holding petitioner's patent invalid for want of invention is based upon different reasoning than is the decision of the Court of Appeals for the Tenth Circuit, petitioner misconceives the purport of Rule 38(5b) and confuses actual conflict between decisions with mere difference of reasoning in arriving at identical decisions. No Court of Appeals has ever held the instant patent valid, and in the absence of conflict between decisions the petition in the instant case should be denied. (*Layne & Bowler Corp. v. Western Well Works,* 261 U. S. 387, 43 S. Ct. 422; *Keller v. Adams-Campbell Co.,* 264 U. S. 314, 44 S. Ct. 356.)

In addition to the two decisions of the Courts of Appeals of the Ninth and Tenth Circuits, the instant patent has been considered by the Court of Appeals for the Ninth Circuit on two other occasions. In *Leishman v. Associated Wholesale Electric Co.* (1943, 9 Cir.), 137 F. 2d 722, and in *Leishman v. Radio Condenser Co. et al.* (1948, 9 Cir.), 167 F. 2d 890, the patent was held not infringed by tuners patent-wise the same as the tuners here in suit. Petitioner attempts to develop a conflict between Circuits by asserting that the Court of Appeals for the Tenth Circuit in its decision in *The Richards and Conover* case holding petitioner's patent invalid disagreed with the Court of Appeals for the Ninth Circuit in its decisions in the *Associated Wholesale* and the *Radio Condenser* cases holding the patent not infringed. Were this the fact it would be immaterial here since the two Circuits agree that the patent is invalid. The Court of

Appeals for the Tenth Circuit in *The Richards and Conover* case did not, however, hold the patent infringed, merely saying at 172 F. 2d page 369:

> "* * * we are unwilling to rest our decision on the narrow ground that the lever in the device of the patent in suit and the plunger in the accused device are not mechanical equivalents."

Additionally, in urging as erroneous those decisions holding his patent not infringed, petitioner states that thereby tuners manufactured by alleged infringers became unavailable for the purpose of showing the commercial success enjoyed by petitioner's patent. This court has had ample opportunity to review those decisions, having denied petitions for certiorari directed to this point no less than three times. In *Leishman v. Associated Wholesale Electric Co.,* 320 U. S. 794, 64 S. Ct. 262, this court denied a petition for certiorari to review *Leishman v. Associated Wholesale Electric Co.,* 137 F. 2d 722. In *Leishman v. Radio Condenser Co. et al.,* 335 U. S. 891, 69 S. Ct. 246, this court denied a petition for certiorari to review *Leishman v. Radio Condenser Co. et al.,* 167 F. 2d 890. In *Leishman v. Radio Condenser Co. et al.,* 336 U. S. 921, 69 S. Ct. 639, this court denied a petition for rehearing of the previous denial of certiorari in *Leishman v. Radio Condenser Co. et al., supra.* Moreover, as recognized by the court below, such commercial success is only pertinent where the question of invention is in doubt. (*Dow Chemical Co. v. Halliburton Oil Well Cementing Co.,* 324 U. S. 320, 65 S. Ct. 647.) Finally, it is well-established that commercial success is not established by proof of sales of independently developed competitive devices. (*Cuno Engineering Corp. v.*

Automatic Devices Corp., 314 U. S. 84, 62 S. Ct. 37; *Schreyer v. Chicago Motocoil Corp.* (1941, 7 Cir.), 118 F. 2d 852; *Johnson v. Lambert* (1916, 2 Cir.), 234 Fed. 886; *Haggerty v. Rawlings Mfg. Co.* (1926, 8 Cir.), 14 F. 2d 928.) The District Court below found as a fact that:

> "11. The widespread acceptance of push-button tuners in the radio industry is not attributable to the disclosures of the patent in suit * * * 12. Such widespread acceptance of push-button tuners in the radio industry is probably due to independent research and experimentation in the engineering department of the Crosley Corporation, an Ohio corporation which, prior to plaintiff, manufactured push-button turners in the radio industry." (Opinion below, 191 F. 2d 522, footnote at page 532.)

On its merits this petition merely quarrels with factual determinations made below and by the Court of Appeals for the Tenth Circuit to the effect that no structure of inventive merit is disclosed by petitioner's patent. This court, in addition to its opportunities for review cited above, twice has denied petitioner's attempt to obtain a review of the decision of the Court of Appeals for the Tenth Circuit holding the patent non-inventive. In *Leishman v. The Richards and Conover Company,* 336 U. S. 952, 69 S. Ct. 882, this court denied a petition for certiorari to review *Richards and Conover Company v. Leishman* (1949, 10 Cir.), 172 F. 2d 365. In *Leishman v. The Richards and Conover Company,* 337 U. S. 927,

69 S. Ct. 1167, this court denied a petition for rehearing of its previous denial of certiorari in *Leishman v. The Richards and Conover Company, supra.* The decisions below are concurrent and only in the most extraordinary case will such decisions be disturbed. (*Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U. S. 275, 64 S. Ct. 593; *Williams Mfg. Co. v. United Shoe Machinery Corp.,* 316 U S. 364, 62 S. Ct. 1179; *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 69 S. Ct. 535.)

Respectfully submitted,

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